

SDNY/NYNY
07-cv-2448
Kaplan

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

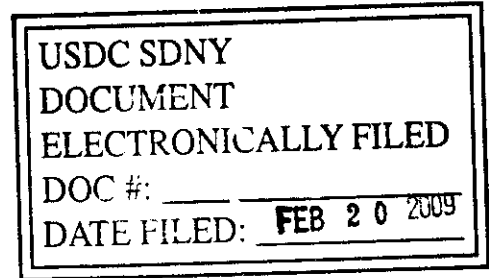
Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at <http://www.ca2.uscourts.gov/>). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of January, two thousand and nine.

PRESENT:

HON. AMALYA L. KEARSE,
HON. CHESTER J. STRAUB,
HON. PETER W. HALL,

Circuit Judges.

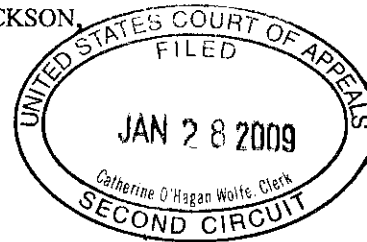


FIVE BOROUGH BICYCLE CLUB, SHARON BLYTHE, JOSH GOSCIAK, KENNETH T. JACKSON,
MADELINE NELSON, ELIZABETH SHURA, and LUKE SON,

Plaintiffs-Appellants,

v.

07-2154-cv



THE CITY OF NEW YORK, RAYMOND KELLY, POLICE COMMISSIONER OF THE NEW YORK CITY
POLICE DEPARTMENT, JAMES TULLER, COMMANDING OFFICER, PATROL BOROUGH MANHATTAN
SOUTH and LT. JOHN DOE AND CAPTAIN JANE DOE, NEW YORK CITY POLICE DEPARTMENT,

Defendants-Appellees.

Appearing For Plaintiffs-Appellants: STEPHEN W. VACCARO, (Jeremy Feigelson, Dina L. Hamerman, *on the brief*) Debevoise & Plimpton LLP, New York, New York.

Appearing For Defendants-Appellees: ELLEN RAVITCH, Of Counsel (Stephen J. McGrath, Robin Binder, Sheryl Neufeld, Of Counsel, *on the brief*), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York.

Appeal from the April 17, 2007, judgment of the United States District Court for the Southern District of New York (Kaplan, *J.*) denying Plaintiffs' motion for a preliminary injunction.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is **AFFIRMED**.

Plaintiffs-Appellants Five Borough Bicycle Club and various individually named bicyclists ("Plaintiffs") appeal from the denial of their motion for a preliminary injunction by the United States District Court for the Southern District of New York (Kaplan, *J.*). Plaintiffs brought the underlying action claiming that Defendants-Appellees the City of New York and the named New York City Police Department officials ("Defendants") have violated Plaintiffs' rights under the First and Fourteenth Amendments by the imposition of the city's new Parade Rules, which require group bicycle rides of 50 or more participants to obtain a permit in advance. In particular, Plaintiffs allege that the Parade Rules impose a burdensome and disorganized permitting process, severely restrict their spontaneous group expression, materially limit their right to travel, and dictate the terms on which they may associate for political and other purposes. We assume the parties' familiarity with the facts, the procedural history, and the issues on appeal.

In this appeal, Plaintiffs argue that the district court's denial of a preliminary injunction was improper. Specifically, Plaintiffs contend that the district court committed fundamental

error by: (1) failing to apply the requirement that restrictions on expressive conduct must be narrowly tailored, as outlined by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); (2) making clearly erroneous factual findings, based on “uncritical deference to the city’s speculative and generalized assertions” and on “the court’s own perceptions” about group bicycling; and (3) failing to recognize the constitutional gravity of the burdens imposed by the Parade Rules on Plaintiffs’ rights to speech, travel, and association. We find no merit in these contentions.

A motion for a preliminary injunction prohibiting a government from taking action in furtherance of “the public interest pursuant to a statutory or regulatory scheme” should not be granted unless the movant “demonstrates both a likelihood of success on the merits, and the likelihood of irreparable harm if an injunction is not granted.” *Vincenty v. Bloomberg*, 476 F.3d 74, 83 (2d Cir. 2007). When an injunction seeks to protect First Amendment rights, the Court must “make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Metro. Opera Ass’n, Inc. v. Local 100 Hotel Employees & Restaurant Employees Int’l Union*, 239 F.3d 172, 176 (2d Cir. 2001) (internal quotation marks and citations omitted). This Court reviews the district court’s denial of a motion for a preliminary injunction for abuse of discretion. *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996). A district court abuses its discretion when: “(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” *Vincenty*, 476 F.3d at 83 (internal quotation marks omitted). We see no abuse of discretion here.

The applicable legal principles are well established. The Supreme Court in *Ward* held that “a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.” *Ward*, 491 U.S. at 798. “[T]he requirement of narrow tailoring is satisfied,” explained the Supreme Court, “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* at 799 (internal quotation marks omitted) (omission in original). At the same time, the Court cautioned that “[t]o be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)); *Vincenty*, 476 F.3d at 84.

This Court has stated that a content-neutral regulation furthering a legitimate government interest and imposing only an incidental burden on speech will be narrowly tailored “if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Vincenty*, 476 F.3d at 84 (quoting *Turner Broad. Sys., Inc. v. Fed. Commc’n Comm’n*, 512 U.S. 622, 662 (1994)) (internal quotation marks and emphasis omitted). In other words, “[t]he essence of narrow tailoring’ is having the regulation ‘focus[] on the source of the evils the city seeks to eliminate . . . and eliminate[] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.’” *Id.* at 84-85 (quoting *Ward*, 491 U.S. at 799 n.7) (alterations in *Vincenty*).

In considering Plaintiffs’ preliminary injunction motion in this case, the district court correctly stated the standard for the granting of such a motion, and it correctly described the

standards stated by the Supreme Court and this Court with regard to the balancing process that the Constitution requires where governmental regulations have an effect on speech. We cannot conclude that the district court's decision rested on an error of law.

Plaintiffs claim that the district court made errors in its findings of fact, contending that the court ignored evidence that the majority of their group bicycle rides did not implicate the City's interests in traffic flow, safety, or public convenience. The record shows, however, that the district court expressly considered Plaintiffs' expert testimony that "group bicycle rides of 50 or more 'enhance safety and do not disrupt traffic.'" *Five Borough Bicycle Club v. City of New York*, 483 F. Supp. 2d 351, 371 (S.D.N.Y. 2007). The court also considered Plaintiffs' attempts to show that group bicycling can be managed by ordinary traffic rules, and it critically examined the apparent inconsistency in Lieutenant Caneco's statements. *Id.* at 371-73.

While the district court recognized that not every group bicycle ride of 50 or more participants will necessarily disrupt traffic, endanger others, or disobey traffic laws, it concluded that because "group bicycle rides of that size can and do present such risks" the Parade Rules requiring advance permitting of all group rides of 50 or more participants were likely justified. *Id.* at 374-75. "At some point," the district court wrote, "bicycle rides of a certain magnitude require coordination with the police for everyone's safety." *Id.* at 375 (internal quotation marks and citation omitted). The court also noted that the Parade Rules leave open alternative channels of expression: the rules do not ban group bicycle riding on public roads and leave almost all roads open to group cycling provided a permit is obtained; the rules do not appear to have any "effect on the quantity or content of [Plaintiffs'] expression," *id.* (quoting *Ward*, 491 U.S. at 802); and in the event a permit is denied, the rules require the police department to employ reasonable efforts to offer the applicant a suitable alternative. *See id.*

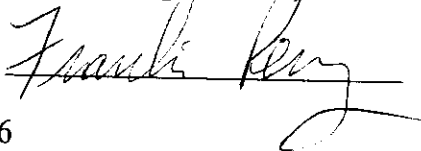
In sum, while acknowledging that “some groups of that size will proceed safely and with no detrimental impact on traffic,” the court determined that, on balance, Defendants provided sufficient evidence to justify denial of a preliminary injunction prohibiting enforcement of the 50-person threshold. *Id.* at 357, 371-73. The district court’s factual findings were not “clearly erroneous” and accordingly do not represent an abuse of its discretion. *Vincenty*, 476 F.3d at 83 (internal quotation marks omitted).

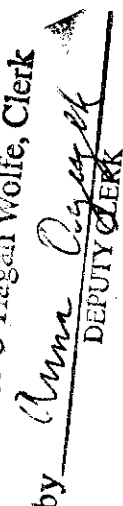
Finally, we speak to the severity of the burden imposed by the Parade Rules on Plaintiffs’ constitutional rights. The court explicitly recognized that Plaintiffs’ rights to travel, freedom of association, and speech were potentially implicated by the Parade Rules. *Five Borough Bicycle Club*, 483 F. Supp. 2d at 361-69. The court then undertook a point-by-point analysis of Plaintiffs’ complaints about the burdens imposed by the rules, in each case weighing the degree to which the alleged harm might encumber Plaintiffs’ constitutional rights. It also considered in-depth whether the rules left open ample alternative channels of expression. *Id.* at 375. The court did not draw any legally erroneous conclusions while so doing, nor were its factual findings with respect to this process “clearly erroneous.” *Vincenty*, 476 F.3d at 83 (internal quotation marks omitted). The court appropriately exercised its discretion.

Accordingly, we find that the district court did not abuse its discretion in declining to grant Plaintiffs’ motion for a preliminary injunction. We have considered all of Plaintiffs’ contentions on this appeal and have found them to be without merit. For the reasons stated herein, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk

by: 

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Catherine O’Hagan Wolfe, Clerk
by  DEPUTY CLERK